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Ethics, Loyalty and Harm to Third Parties: A Debate Based on *Spaulding v. Zimmerman*

This article was written under the auspices of the Ethics Perspectives column, a project of the Cleveland Bar Association's Professional Ethics Committee. Articles appearing in the Cleveland Bar Journal express the opinions of the individual authors and should not be construed as legal advice or as the opinions of the Association.

Introduction

This discussion poses the question: should an attorney ever provide information to an opposing party to prevent that party from suffering great harm if the information will have an adverse effect on the attorney's own client? The case that sets the stage for this discussion is *Spaulding v. Zimmerman*, 243 Minn. 346 (1962). In *Spaulding*, the plaintiff, a minor involved in an automobile accident, settled a personal injury suit for a relatively small amount. Although neither the plaintiff nor his attorney were aware, the defendants' counsel knew that the accident resulted in an aortic aneurysm, a condition that could have lead to death at any time had the injured artery burst. Defense counsel neither talked to nor advised their clients about the option to disclose the information to the plaintiff. Two years later, when the plaintiff discovered his condition, the trial court set aside the settlement.

The Minnesota Supreme Court affirmed. The court emphasized that defense counsel had acted in good faith in not disclosing the information prior to settlement and stated that counsel had no duty to disclose. The basis for vacating the prior order was that the attorneys should have informed the trial judge about the minor's condition when seeking court approval of the settlement. The attorneys had a duty to be forthcoming to the court, if not to the plaintiff. Under the court's rationale, the attorneys would have had no duty to

disclose at any time had Mr. Spaulding been an adult.

Argument by Lloyd Snyder

David Spaulding spent two years bearing a life-threatening condition because opposing counsel in his civil suit assumed that the duties of confidentiality and zealous representation of their clients justified withholding this information. Many attorneys agree with this result, and argue that it is a necessary consequence of the adversary system. Many of these same attorneys complain that the public unfairly criticizes lawyers for being amoral, if not immoral. They tout our codes of professional responsibility as proof that we are more concerned with ethical behavior than most other professions. I disagree.

When we first entered law school, I doubt that many of us would have justified withholding information that threatened the life or health of another person. Most of us had some notion that we were entering the legal profession, at least in part, for the purpose of promoting justice. We may have had sharply differing views about what it meant to promote justice, but it is difficult to believe that many would have viewed that notion as minimizing the financial cost to an insurance company by concealing a deadly risk.

In the culture of the legal profession, winning trumps justice. An attorney who has prevailed in a case because the other side

was ignorant of significant information is an attorney who has done a good job for the client. Any blame for this result rests with the lack of diligence of opposing counsel, with the nature of the adversary system, with the obligation of confidentiality or with the quality of the trial judge. It is the fault of everyone but the lawyer who had the information that made clear that the result was unfair. Is it any wonder that in this system, the public holds lawyers in low regard?

Recently, the legal profession has responded to its low standing in the non-legal community by promoting professionalism. Among other things, professionalism has been defined to include communicating promptly and clearly with clients, being courteous to others, avoiding delays and consulting with opposing counsel on procedural matters. There is nothing wrong with any of these ideas. But if they are intended to overcome the public's attitude about lawyers, they are doomed to failure. This is so for two reasons.

First, in a system where winning trumps justice, the pressure on counsel is to obtain the maximum amount of information about a matter while providing the minimum amount of information to opposing parties. This is not a formula for promoting cooperation and openness. Zealous representation of one's client promotes, and may mandate, withholding information up to the point of being dishonest. Frustration, anger and stressful interaction between opposing counsel is likely to result. Second, being pleasant, prompt, and courteous is not likely to improve the standing of lawyers

whose central tenet is that achieving an unjust result is a worthy goal if the result is advantageous to one's client.

Other professions and callings, even those that emphasize the obligations of loyalty and confidentiality, do not treat these obligations as absolute as does the legal profession. A standard agency hornbook, for example, states that an agent has a duty to maintain confidences on behalf of a principal, but is excepted from that duty by "a statement as to proposed future crimes or acts which will harm others." A comment to the Restatement of Agency prohibits an agent from disclosing confidential information obtained from a principal "except in the superior interest of another."

It is time for the legal profession to ask why the law of agency has this expression of concern about harm to others and the law of lawyering does not. If we are unwilling to question our excessive concern for secrecy and zeal, then, at the very least, we should stop complaining about our low standing in the court of public opinion. We should recognize it as a reputation we have earned.

Reply by Scott Rawlings

The story is told of a young lawyer many years ago who cabled his senior partner in a distant city that their client's trial had resulted in "justice being done." Without knowing more, the senior partner wired back: "Appeal immediately!" Apparently, justice wasn't what the senior partner had in mind. He didn't think that the client's interests were served by notions of justice. Rather, the client wanted to win. The client wanted his counsel to zealously advocate his cause and achieve the end result he wanted. After all, wasn't that what he was paying his attorney to accomplish for him? Wasn't that what defense counsel in *Spaulding* was paid to do?

The court in *Spaulding* clearly and unequivocally held that defense counsel had not violated any ethical standard nor was counsel in violation of any rule of civil procedure. In short, there was no written duty binding upon lawyers in Minnesota

that governed the disposition of the motion to vacate the settlement. The decision to vacate the settlement, rather, was based on principles of equity, *i.e.*, upon the inherent power of the court to "do the right thing." What is the "right thing" for an Ohio lawyer to do if faced with an issue of disclosure where life or death of one of the parties may be implicated?

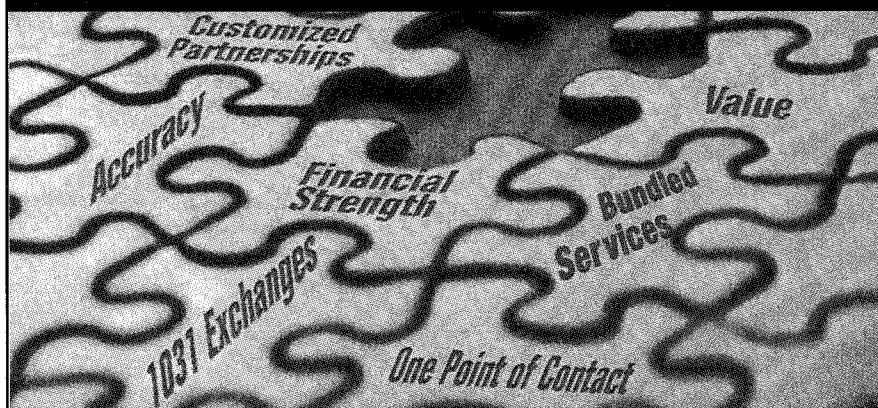
It may be helpful at the outset to make an initial observation when considering that question. A lawyer has no obligation, or right, to impose his or her moral sense onto client decisions, and courts have no power to require attorneys appearing before them to disclose information based upon their own moral standards. Morality is in the eye of the beholder, and should not clothe itself in the civil law. Were it otherwise, the application of the law would be ecclesiastical, not civil. That is not our system of justice. "Fairness," though, is a factor that is often weighed by courts when applying equitable principles. The trial court in *Spaulding* was applying equitable principles.

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How many times have we succumbed to the pressure of winning and presumed that we were acting in our client's interest? A moral code would induce us to resist this pressure, not to embrace it.

A settlement agreement, for example, requires a court to weigh factors that would not necessarily present themselves – or at least not to the same degree – if the issue arose in an adversarial evidentiary context. When reviewing a settlement agreement, a court is required to determine, among other things, that the agreement is fair. A determination of fairness necessarily involves an analysis of the relationship between the parties, the relative extent of knowledge of the parties, and whether or not the settlement is the product of “arms-length bargaining.” Whether facts have been withheld by either party – and the importance of any facts withheld – is critical to a decision as to whether or not to approve the settlement. Those kinds of considerations are as applicable in Ohio as they are in Minnesota. To that extent, I believe that an Ohio court might well reach a result similar to the Minnesota court in *Spaulding* if the matter arose in the context of a settlement agreement.

Outside the settlement context, failure to speak when under a duty to speak can be grounds for disciplinary action. For example, in *Cincinnati Bar Ass'n v. Nienaber* (1997), 80 Ohio St. 3d 534, a lawyer was charged with misconduct in the context of representing the defendant in a DUI case in the Hamilton County Municipal Court. After a no contest plea was entered, but before sentencing, the court and counsel engaged in discussion in which the judge was led to believe, by the counsel's statements and by his failure to disclose the pendency of another proceeding, that the DUI charge was the defendant's first and that there were no other pending charges. In fact, as the attorney knew, his client was involved

with another and pending DUI case. That case was tried later the same day. When asked by the judge in that second case, the lawyer did not disclose that his client had been convicted earlier the same day, and led the second judge to believe that the DUI charge was his client's first in the last five years.

The court upheld the panel's conclusion that the respondent knowingly made false statements to each of the two judges in violation of DR 7-102(A)(5) (knowingly making a false statement of law or fact in the representation of a client) and that he also violated DR 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) and DR 1-102(A)(5) (engaging in conduct that is prejudicial to the administration of justice). It found that the respondent made affirmative representations to the judges that were untrue and, by his silence, also allowed each court to draw unwarranted inferences.

The respondent defended his conduct by claiming that he did not misrepresent the facts. Rather, he argued, he was not asked specific enough questions by the court. Under these circumstances, the attorney claimed, he was not required to disclose facts known to him about the other proceeding. Additionally, relying on advice he received in the form of an ABA opinion when he attended an ABA seminar on criminal law, he claimed that an advocate in a criminal case is not required to disclose his client's record unless specifically asked.

The Ohio Supreme court rejected these defenses. It held:

“... DR 7-102(A)(5) specifically prohibits a lawyer from making a false statement of law or fact. In Judge Helmick's court respondent made affirmatively false statements. Moreover, by his silence, respondent led both judges to a false appreciation of the situation.

Second, Formal Op. No. 287, [the ABA opinion], relied upon by respondent, applies only to confidential information obtained by the client... No client may demand or expect of his lawyer, in the furtherance of his cause, disloyalty to the law whose minister he is (Canon 32), or any manner of fraud or chicanery (Canon 15). In this instance, the respondent's knowledge of the pending cases did not depend upon confidential communications from his client, and Formal Op. 287 does not apply.

We require complete candor with courts. We agree with the Supreme Court of Nebraska, which sixty years ago said, ‘An attorney owes his first duty to the court. He assumed his obligations toward it before he even had a client. His oath requires him to be absolutely honest even though his client's interests may seem to require a contrary course. The [lawyer] cannot serve two masters; and the one [he has] undertaken to serve primarily is the Court.’ In re *Integration of Nebraska State Bar Ass'n* (1937), 133 Neb. 283, 289, 275 N.W. 265, 268.”

This holding is consistent with The Lawyer's Creed, which states that an attorney “shall do honor to the search for justice” and to the professionalism standards requiring honesty with courts, clients and the public.

Nonetheless, a lawyer should maintain client confidences (DR 4-101(B),(C)) and clearly has an affirmative duty to zealously represent his or her client (DR 7-101(A)(1-3)). As EC 7-19 states:

“An adversary presentation counters the natural human tendency to judge too swiftly ... the advocate, by his zealous presentation of facts and law, enables the Tribunal to come to the hearing with an

open and neutral mind and to render impartial judgment ..."

The adversarial system is designed to promote justice, not counter or trump it, as EC 7-19 recognizes. The ideals that are part of our professionalism standards encourage cooperation, courtesy, and candor within the adversarial system as it exists, and impliedly endorse that system by their approach to the aspirational ideals toward which attorneys should strive.

Therefore, in my view, the proper course in light of a decision such as *Spaulding* is not difficult to chart. No canon of ethics, rule of civil procedure or principle of law requires a lawyer to volunteer information during the discovery process. Rather, the lawyer's obligation is not to conceal data or information or otherwise "hide the ball," *Cincinnati Bar Assn v. Marsick* (1998), 81 Ohio St. 3d 551. However, it is not appropriate behavior to remain silent when under a duty to speak (*Nienaber*, supra) and a duty of full disclosure is attendant upon the presentation to a

court of a settlement agreement because the court, sitting as an equity tribunal, is required to judge the fairness of the settlement document. Fairness or justice, though, does not mandate a duty to volunteer client data or information in the discovery process not sought by the adversary, regardless of the attorney's sense of moral duty. The adversarial process is still the foundation of our civil justice system.

Rebuttal by Lloyd Snyder

I have no quarrel with Mr. Rawling's description of the professional responsibility obligations that apply in a case like *Spaulding*. He may have overstated the likelihood that a court in Ohio would set aside the settlement, but that is a quibble. Mr. Spaulding was 20 years old at the time of the accident. Were his case to arise in Ohio, he would be considered an adult, and the basis for setting aside the settlement would not exist.

My quarrel is with the immorality of a code that fosters the pressure to win at any cost. Attorneys are under enormous pressure to

win, as the legal system defines winning. In a personal injury case, that means to resist a determination of liability and to minimize the damages. We do not need ethical codes to reinforce that pressure.

Succumbing to that pressure, Mr. Zimmerman's attorney assumed that his client would want him to fight for the best possible outcome. The attorney did not even go to his client and raise the option of warning David Spaulding that he had a life-threatening medical condition, knowing that the disclosure would increase the cost of settlement. How many of us have made similar assumptions when representing what we defined as the interests of our clients? How many times have we succumbed to the pressure of winning and presumed that we were acting in our client's interest? A moral code would induce us to resist this pressure, not to embrace it.

Scott Rawling and Lloyd Snyder are members of the CBA's Ethics and Professionalism Committee

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In order to further professionalism among lawyers and judges, The Cleveland Bar Association announces the establishment of The Cleveland Bar Association Professionalism Award to be awarded annually to a lawyer or judge who has significantly contributed to the enhancement of professionalism in the Greater Cleveland legal community by exemplifying the goals of the Ohio Supreme Court's A Lawyer's Creed and A Lawyer's Aspirational Ideals and by furthering the ideals expressed in the Mission of the Cleveland Bar Association.* Nominations are encouraged from Bar Association members and other interested persons; the nominees need not be members of The Cleveland Bar Association.

Nominations for the 2000-2001 Award, and the basis therefor, should be submitted in writing to: The Ethics and Professionalism Committee, Cleveland Bar Association, 113 St. Clair Avenue, N.E., Suite 100, Cleveland, Ohio 44114-1253; Attention: Richard Zeiger, chair. Please include your address and telephone number. Nominations must be submitted no later than December 31, 2000.

Nominations will be reviewed and evaluated by a committee comprised of lawyers, judges and law professors recommended by the Ethics and Professionalism Committee and approved by the Board of Trustees of The Cleveland Bar Association.

The recipient of the Award will be selected during the first quarter of 2001 with the award to be formally presented at the Association's annual meeting in June.

* The Cleveland Bar Association's mission is "to serve as a center for legal professionalism in the region by educating the bar, by providing resources that enhance client service, and by promoting integrity and ethical behavior among lawyers; to improve the administration of justice on behalf of the public and the Cleveland legal community; to improve public understanding of the law and the justice system; and to foster an environment in which a diverse Association membership can experience excellence and fulfillment in the practice of law and service to the public."

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